



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Advance Gear & Machine Corp.
File: B-228002
Date: November 25, 1987

DIGEST

1. Agency may award contract on basis of initial proposals where solicitation advises offerors of possibility, acceptance of initial proposals will result in lowest cost to government, and no discussions were held. Request for information that does not bear on acceptability of proposal and does not provide an opportunity for material proposal revisions does not constitute discussions.
2. General Accounting Office will not consider protest of affirmative determination of responsibility absent showing of possible fraud or bad faith or allegation that definitive responsibility criteria were not applied. Protester's disagreement with affirmative determination that was based on generally favorable information, including positive preaward survey, does not demonstrate bad faith. Contention that offeror failed to provide sufficient information with proposal to support source approval does not involve a definitive responsibility criterion.
3. Protest that delivery schedules in request for proposals overstated agency's minimum needs is untimely and will not be considered because it was not raised until after the closing date for receipt of initial proposals.

DECISION

Advance Gear & Machine Corp. protests the Air Force's award of a contract to Bemsco, Inc., on the basis of initial proposals submitted in response to request for proposals (RFP) No. F41608-87-R-2628. The RFP was for the acquisition of 702 hydraulic pump housings used in the T-38A and F-5A/B aircraft. We deny the protest in part and dismiss it in part.

Because the housings are critical components, the RFP was issued on a restricted basis to three sources that previously had been approved as suppliers: Northrop Corporation, Lear Siegler, and the protester. The RFP also allowed

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unapproved sources to submit information with their proposals sufficient to permit approval, and stated that such offers might be considered for award. The RFP contained two distinct delivery schedules. The first, which contemplated first article testing, required delivery of one housing 120 days after receipt of an order, provided 45 days for Air Force approval, and then required delivery of 701 housings 120 days after approval; this schedule provided a total of 285 days for delivery of the entire contract amount. The second alternative, with waiver of first article testing, required delivery of all 702 housings 120 days after receipt of an order.

Advance and Bemsco were the only offerors. Bemsco provided information with its proposal seeking approval as a source and offered to satisfy the delivery schedule applicable to first article testing. Advance submitted offers with and without first article testing, but proposed delivery schedules which differed from the terms of either alternative. Bemsco was the lower priced offeror.

After inquiries to Bemsco for additional information, such as the identity of Bemsco's supplier of castings used in the housings, the Air Force approved Bemsco as a source, subject to first article testing, and awarded the contract to the company. The record shows that the Air Force's approval of Bemsco as a source was premised in large part on Bemsco's proposed production of the housings using drawings obtained from one of the already-approved sources.

Advance contends that the Air Force's award of the contract without discussions with Advance was improper. In support of this assertion, Advance argues that the Air Force conducted discussions with Bemsco, and that this required the Air Force also to conduct discussions with Advance. Advance also contends that Bemsco is not capable of performing the contract, and argues that in deciding otherwise, the Air Force acted in bad faith and failed to apply a definitive responsibility criterion--the requirement that sufficient information for source approval be submitted with the proposal.

Under the Competition in Contracting Act of 1984, 10 U.S.C. § 2305(b)(4)(A)(ii) (Supp. III 1985), as implemented by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.610(a)(3) (1986), an agency may award a contract on the basis of initial proposals where the solicitation advises offerors of that possibility, discussions are not held, and the competition or prior cost experience clearly demonstrates that acceptance of initial proposals will result in the lowest overall cost to the government. See Glar-Ban, B-225709, Apr. 14, 1987, 87-1 CPD ¶ 406. The Air Force's

RFP did advise offerors of the possibility that award might be made on the basis of initial proposals, Bemsco was the lower-priced offeror, and we find that the Air Force did not conduct discussions with Bemsco.

We generally consider that discussions have taken place if an offeror is given the opportunity to revise its initial proposal, either in terms of price or technical approach. Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642. The information that Bemsco provided to the Air Force after the closing date for receipt of proposals either addressed Bemsco's capability and capacity to perform the contract, concerned Bemsco's approval as a source, or was a response to the Air Force's request for information needed to complete clauses B-1 and D-502 of the RFP. These clauses included, respectively, the standard vendor certifications and a request for the adjustment, specifically excluded from the evaluation, the offeror would apply to its price if the government chose the offeror's standard commercial packaging in lieu of the specified packaging.

Questions pertaining to an offeror's capacity and capability involve issues of responsibility, that is, the offeror's ability to perform the contract, as opposed to the acceptability of a proposal, and therefore may be requested or provided without resulting in the conduct of discussions. Edgewater Machine & Fabricators, Inc., B-219828, Dec. 5, 1985, 85-2 CPD ¶ 630. Also, the standard certifications do not result in any change to any material part of the offer. See, e.g., the discussion in Gracon Corp., B-224344, July 7, 1986, 86-2 CPD ¶ 41, involving a sealed bid procurement in which we regarded the failure to provide standard certifications as a waivable minor informality.

Moreover, although agencies may limit the competition for parts to approved sources if necessary to assure the safe, dependable, and effective operation of military equipment, see, e.g., B.H. Aircraft Co., Inc., B-222565, et al., Aug. 4, 1986, 86-2 CPD ¶ 143, the process of obtaining approval as a source may be conducted outside of a procurement and is an independent activity, even though it may be coincident with a procurement. See, e.g., Rotair Industries, Inc., B-219994, Dec. 18, 1985, 85-2 CPD ¶ 683, involving source approvals both separate from and in conjunction with procurements. The information Bemsco provided to the Air Force to gain source approval was part of this independent activity and was neither essential to determining the acceptability of, nor changed, Bemsco's underlying proposal. Finally, we note that the allowance for commercial packaging was specifically excluded from the evaluation, and had no effect on the selection decision; we do not see how the request for provision of this figure, and

Bemisco's compliance, can be viewed as negotiations, or otherwise prejudiced Advance.

In sum, the information that Bemisco provided to the Air Force related to functions other than determining the acceptability of Bemisco's proposal and, by requesting it, the Air Force did not enter into discussions with Bemisco.

The remainder of the protest focuses on Advance's disagreement with the Air Force's assessment of Bemisco's capability and capacity to produce the housings. Our Office, however, will not consider a protest of an agency's affirmative determination of responsibility absent a showing of possible fraud or bad faith on the part of procurement officials or an allegation that definitive responsibility criteria were not applied. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(5) (1987). The protester's disagreement with the Air Force's affirmative determination of responsibility, which was based on a positive preaward survey and a generally favorable report on Bemisco's performance history, is not sufficient to establish bad faith. Keyes Fibre Co., B-225509, Apr. 7, 1987, 87-1 CPD ¶ 383. Also, the stipulation that information sufficient for approval be provided with the proposal is simply not a definitive responsibility criterion, i.e., a standard applied by the agency for measuring a particular offeror's ability to perform a contract, Yale Materials Handling Corp.--Reconsideration, B-226985.2, et al., June 17, 1987, 87-1 CPD ¶ 607. There is no basis, therefore, for us to review the Air Force's affirmative determination of Bemisco's responsibility.

Advance also asserts that the requirement for delivery 120 days after receipt of an order overstated the Air Force's minimum needs and unduly restricted the competition. In support of this contention, Advance cites the two different schedules in the RFP and argues that there should have been a single required delivery schedule based on the later one provided for under the first article alternative. Advance argues the Air Force's failure to conduct discussions denied Advance an opportunity to address this question.

Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that a protest of alleged improprieties which are apparent in a solicitation prior to the closing date for receipt of initial proposals be filed before that date. Both schedules were clearly stated in the RFP. Advance therefore had the opportunity to raise its concerns about the delivery schedules prior to the closing date for receipt of initial proposals and should have done so. Because Advance did not raise this objection until after that date, the contention

is untimely and will not be considered. Malzahn Co.,
B-225813, June 5, 1987, 87-1 CPD ¶ 574.

The protest is denied in part and dismissed in part.

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James F. Hinchman
General Counsel